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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

No. 471

A. B. GOCHENOUR, MEYER ABRAMS, HARRY J. MYERSON and FANNIE B. STERN, EXECUTRIX OF THE ESTATE OF JOSEPH L. STERN, DECEASED,

Petitioners,

VS.

THE CLEVELAND TERMINALS BUILDING COMPANY, FREDERICK L. LECKIE, JOSEPH G. FOGG and I. WALTER SHARP,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

MEYER ABRAMS,
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Respondents.

PETITION FOR WRIT OF CERTIORARI.

Petitioners A. B. Gochenour, Meyer Abrams, Harry J. Myerson and Fannie B. Stern, Executrix of the Estate of Joseph L. Stern, deceased, the Appellants in the above entitled cause, petition this court for the issuance of a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit,

which affirmed the order of the District Court of the United States, allowing $65,000.00 as fees to the Appointees of the Court and nothing to the petitioners representing creditors, to the end that the judgment be reversed with directions to reduce the fees of the Appointees of the Court and to allow reasonable compensation to the petitioners.

STATEMENT OF THE MATTER INVOLVED.

This Petition seeks to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, affirming the order of the District Judge, who allowed $65,000.00 in fees to his Appointees, the respondents herein, and nothing to the petitioners, counsel for certain creditors, who were primarily responsible for the prosecution of the action which resulted in the recovery of $550,000.00 for the benefit of the bankrupt estate.

Petitioners sought an allowance for services rendered from August, 1939, to May 1, 1941, when Respondents were appointed as attorneys for the debtor to institute the proceedings whereby the recovery was made as a result of a compromise. While Respondents were appointed on May 1, 1941, they also sought and were allowed compensation from November 22, 1938, to May 1, 1941, prior to their appointment.

The Court of Appeals held that no matter how beneficial Petitioners' services were, they were entitled to nothing, because of their failure to obtain an order from the Court to perform their services. At the same time it affirmed the allowance to the Respondents for their alleged services prior to their appointment. The services of the Petitioners and Respondents were performed while the debtor, Cleveland Terminal Building Company was

undergoing reorganization under Section 77B, in the District Court of Cleveland, Ohio.*

Petitioners, according to the opinion (R. 104), made a comprehensive study of the facts conceived and developed the legal theories which formed the basis for the recovery of the $550,000.00. They instituted a suit in Cleveland, in the name of "Howe" and another suit in the name of "Gochenour" in Indiana, to recover the fund. The Indiana suit was dismissed on the ground that "creditors" had no right to bring the action due to the fact that the "debtor" was administered by the District Court in the reorganization proceedings. While the other action was still pending at Cleveland, Petitioners applied to the District Court to permit them to sue in the name of the debtor and for other relief. After the denial of the application, they appealed to the Sixth Circuit which reversed the decision below with directions to appoint an examiner to investigate the charges contained in the two suits and, if the charges were well founded, that the debtor should proceed with the suit, or upon its refusal, that Petitioners be given the right to maintain the action in its name (*Gochenour* v. *The Cleveland Terminals Building Company*, 118 F. (2) 89).

Thereafter on May 1, 1941, Respondents were appointed as counsel for the debtor on their own application on an *ex parte* order and they instituted the suit in Indiana which brought the $550,000.00 fund, as a result of a compromise. They filed a petition for compensation asking for $75,000.00 (R-1-19), scheduling 1600 hours, one-third of which was for alleged services performed from November 28, 1938, to May 1, 1941, prior to their appointment (R-17-19). Petitioners filed a petition asking for an allowance of $25,000.00 (R-19-24). Their application for

* The Debtor was in possession in lieu of a Trustee and because of the adverse interest of its officers and directors, the Court appointed Respondents, Fogg and Leckie, as Supervisors, and he appointed the Respondent, I. Walter Sharp, to represent the Debtor as to some of the phases of the reorganization.

services up to the appointment of the Respondents, covered 870 hours (R-19-24).

The hearing was had before a Master who recommended an allowance of $65,000.00 to the Appointees of the Court and "nothing" to the Petitioners. He based his recommendation on the ground that the services of the Petitioners were not beneficial to the estate and that the fund was recovered solely as a result of the services performed by the Respondents and also on the ground that Petitioners were volunteers. He did not apply this to the appointees of the Court for the services rendered prior to their appointment, while they served as volunteers.

The District Judge did not overrule the objections to the Master's report on the ground that Petitioners were volunteers, but on his conclusion that his appointees were entitled to all of the credit.

The Court of Appeals held that Petitioners did perform beneficial services in conceiving and developing the cause of action and in supplying the facts which brought about the prosecution of the Cause of Action. It held however, that no matter how beneficial their services might have been, they were entitled to "nothing" because of non-compliance with General Order 44.

THE QUESTIONS PRESENTED.

The following questions are presented by this petition:

1. Whether Rule 52 which the Court of Appeals invoked to sustain the allowance of $65,000.00 to the Appointees of the court was applicable in the instant case, in the absence of any foundation for the findings.

2. Whether it was proper to ignore the application of General Order 44 against the Appointees of the Court who represented the "debtor" for services claimed to have been rendered prior to their appointment and to apply it against the Petitioners who represented "creditors".

3. Whether the Appointees of the Court were entitled to the $65,000.00 for alleged 1600 hours of services when 400 of these hours were consumed prior to their appointment, and where they were not appointed on a contingent basis, and there was no showing why it was necessary to employ three sets of lawyers besides the attorney who filed the suit in Indiana.

4. May a District Judge overrule objections to a Master's report which lacked essential basic findings without making findings of his own and sustain the report on conclusions which are different from the Master's conclusion, and may his order be affirmed by a reviewing court which was neither in accord with District Judge nor with the Master on the factual issue, by reason of alleged non-compliance with General Order 44, when the point was not even raised and when it is clearly inapplicable?

5. May a Judge overrule objections to a Master's report without passing on the objections to the admissibility of evidence and enter judgment based on such evidence, and was it proper for a court of review to base its opinion on such evidence, without even discussing or ruling on the competency of the evidence, when the authorities on their incompetency were not even disputed by the Respondents?

REASONS FOR THE ALLOWANCE OF THE WRIT.

1. The United States Court of Appeals applied General Order 44 in Bankruptcy contrary to Section 242 and 243 of the Bankruptcy Act. Its erroneous construction of the order and its application to reorganization proceeding under Chapter X calls for the exercise of the discretionary powers of this Court to review its decision by the issuance of the writ in order to settle important Federal questions of procedure and to harmonize this Order with the statutory provision.

2. The application of Rule 52 to a case where the foundation for the findings is completely lacking is in direct conflict with the decisions of other circuits and with the latest decisions of this Court, and the writ should be issued to harmonize the decisions.

3. The allowance of $65,000.00 to Appointees of a Bankruptcy Court who were not appointed on a contingent basis, without any evidence in the record showing the basis for the allowance, can find no support in the law and involves an important federal question in the administration of Bankruptcy.

4. The application of two different measures of justice, one in favor of the Appointees of the Court without applying General Order No. 44 against them, and the other, against the Petitioners, by invoking General Order No. 44, deserves a review of the case by this Court.

5. The refusal of the Court of Appeals to pass on the admissibility of incompetent evidence by the Master, the affirmance of the order of the District Judge based on such evidence, the resort of the reviewing court to Rule 52 to justify the allowance of $65,000.00 to the Appointees of the Judge and the denial of any compensation to the Petitioners, because of non-compliance with

Order No. 44 which is clearly inapplicable, involve important questions of Federal procedure and administration of justice as to warrant a review of the case by the issuance of a Writ of Certiorari.

PRAYER FOR RELIEF.

Petitioners therefore pray that this court may allow the Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to the end that its judgment affirming the order of the District Court be reversed with directions to reverse the order below and to direct a reduction of the fees of the Respondents and to allow reasonable compensation to the Petitioners.

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